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No. 91-1686

FILED
JUN 25 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

BASSEM BOURHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the delay between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial.

2. Whether the admission at petitioner's trial of testimony given at a prior trial violated the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Barker v. *Wingo*, 407 U.S. 514 (1972)	5
Bourjaily v. *United States*, 483 U.S. 171 (1987)	7
Doggett v. *United States*, No. 90-857 (June 24, 1992)	6
Idaho v. *Wright*, 110 S. Ct. 3139 (1990)	7
Ohio v. *Roberts*, 448 U.S. 56 (1980)	7
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	4
United States v. *Buljubasic*, 808 F.2d 1260 (7th Cir.), cert. denied, 484 U.S. 815 (1987)	5
United States v. *Leavitt*, 878 F.2d 1329 (11th Cir.), cert. denied, 493 U.S. 968 (1989)	6
United States v. *Loud Hawk*, 474 U.S. 302 (1986)	5
United States v. *Marion*, 404 U.S. 307 (1971)	4

Constitution, statutes and rules:

U.S. Const. Amend. VI (Confrontation Clause)	4, 6
21 U.S.C. 952(a)	2
21 U.S.C. 963	2
Fed. R. Evid.:	
Rule 804(a)(5)	4
Rule 804(b)(5)	7

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OPINION BELOW

The order of the court of appeals (Pet. App. 8-9) is unreported, but the judgment is noted at 951 F.2d 367 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1991. The petition for a writ of certiorari was filed on March 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to import methaqualone and marijuana into the United States, in violation of 21 U.S.C. 963; importing methaqualone, in violation of 21 U.S.C. 952(a); and attempting to import methaqualone, in violation of 21 U.S.C. 963. Petitioner was sentenced to 15 years' imprisonment, to be followed by a special parole term of four years. The court of appeals affirmed.

1. During 1980 and 1981, petitioner, a pilot, flew planeloads of methaqualone from Colombia to the Bahamas. Upon arriving in the Bahamas, petitioner and his co-conspirators transferred the contraband to a boat for shipment to Miami. Petitioner was paid as much as $45,000 per shipment. Petitioner also flew his co-conspirators back and forth between Miami and the Bahamas. The purpose of some of those trips was to make payments to Bahamian officials who permitted the conspirators to use the islands as a transfer point. See Gov't C.A. Br. 3-13.

Petitioner was indicted in August 1984. The government did not immediately apprehend him, although it took several steps to locate him. First, it entered petitioner's name in the El Paso Information Center (EPIC) computer system, the Treasury Enforcement Communication System (TECS), and the National Crime Information Center (NCIC) computer systems. In December 1984, the government interviewed petitioner's wife and her parents regarding his whereabouts, and advised them of the indictment. Although they told the government agents that petitioner was in Kuwait or Syria, the government was unable to verify that information. Eventually, it became clear that petitioner left the United States in January 1983 and did not return until

1987, when he entered without being detected. Petitioner finally was arrested on February 7, 1990, when radar picked up his plane entering the United States from the direction of the Bahamas.* See Gov't C.A. Br. 18-21, 24-25.

2. Petitioner moved to dismiss the indictment, arguing that the government's delay in apprehending him deprived him of his right to a speedy trial. The district court denied the motion based on its finding that the government had done all that it could have done to find petitioner from the time of his indictment in August of 1984 until it apprehended petitioner in 1990. See Gov't C.A. Br. 24-26.

Before trial, the government filed a motion in limine to introduce certain prior testimony of Inspector Rudolph Cunningham of the Royal Bahamian Police. In 1985, at the trial of petitioner's co-defendants, Inspector Cunningham had testified (1) that there was no market for quaaludes (methaqualone) in the Bahamas; (2) that petitioner was arrested in the Bahamas in 1981; and (3) that methaqualone was classified as a dangerous drug in the Bahamas at the time of petitioner's offenses. The government explained that it had attempted to secure Cunningham's presence at trial but had failed because he was beyond the subpoena power of the United States. See Gov't C.A. Br. 35, 37.

In response to inquiry by the court, petitioner explained that he was not contending that the testimony had insufficient guarantees of trustworthiness, but only that the statements were immaterial and hearsay. Also,

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* At the time of his arrest, petitioner was carrying four separate passports with overlapping expiration dates, one of which, issued two months after the indictment, contained an altered spelling of petitioner's name. See Gov't C.A. Br. 19.

he indicated that his challenge extended only to that portion of the testimony regarding the existence of a market for methaqualone in the Bahamas in the early 1980's. The district court found that Cunningham was unavailable under Fed. R. Evid. 804(a)(5), overruled petitioner's objection, and allowed the government to introduce Cunningham's prior testimony. See Gov't C.A. Br. 35-37.

3. The court of appeals affirmed petitioner's conviction without opinion. Pet. App. 8-9.

ARGUMENT

1. Petitioner first contends (Pet. 10-21) that the delay between the return of the indictment in August 1984 and his arrest in February 1990 violated his right to a speedy trial, arguing (Pet. 19) that "the Government made no effort to locate [him], despite numerous readily available avenues for finding and alerting him to the pending charges." Because the district court found that the government did all that it could to locate him after the indictment was returned, this challenge in substance is a challenge to the district court's factual findings, which the court of appeals did not overturn. This is not a proper subject for this Court's review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

Petitioner first asserts (Pet. 13-14) that the government should have known his whereabouts while he was cooperating with Florida authorities in a criminal investigation in Martin County. That investigation, however, concluded before the indictment was returned; until the indictment was returned, petitioner's Sixth Amendment speedy trial right had not attached. See *United States* v. *Marion*, 404 U.S. 307, 313-325 (1971). After the indictment was returned, it is undisputed that petitioner was out of the country for three years; that in December 1984 the government had informed petitioner's wife of the

pending charges but was unable to ascertain petitioner's location; that the government entered petitioner's name in the various law enforcement computers; that petitioner had multiple passports and had varied the spelling of his name; and that petitioner had evaded detection upon reentering the United States. In these circumstances, the government was not required to take additional steps to locate petitioner. Even if the government could have done more, that is not sufficient in itself to establish a violation of the constitutional right to a speedy trial. See *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972) (negligence is only a neutral factor in determining a constitutional speedy trial claim).

Other factors also weigh against petitioner's speedy trial claim. For instance, although it is undisputed that the government advised petitioner's family of the indictment in 1984, and that petitioner was aware that the government had contacted his family, petitioner did not assert his right to a speedy trial until the government apprehended him years later. The courts were permitted to give the absence of a demand "strong evidentiary weight in determining whether [petitioner was] deprived of the right" to a speedy trial. *Barker* v. *Wingo*, 407 U.S. at 531-532; see *United States* v. *Loud Hawk*, 474 U.S. 302, 314-315 (1986).

Further, petitioner's speedy trial claim must fail because he was not prejudiced by the delay. Petitioner complains (Pet. 19) that the delay prevented him from being tried with his co-defendants in 1985. But petitioner's own actions, not any government misconduct, caused the separate trials. In any event, joint trials in many cases benefit the government rather than the defendant. See, *e.g.*, *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.) (discussing ways in which joint trials benefit the government and in some cases prejudice defendants), cert. denied, 484 U.S. 815 (1987). Petitioner does not

explain how he would have benefited from a joint trial with his eight co-defendants. See *United States* v. *Leavitt*, 878 F.2d 1329 (11th Cir.), cert. denied, 493 U.S. 968 (1989) (affirming convictions of petitioner's eight co-defendants). Accordingly, this contention is inadequate to establish prejudice.

Petitioner also argues (Pet. 20) that the delay cost him the opportunity to cross-examine Inspector Cunningham, who became unavailable after the 1985 trial. But Cunningham was cross-examined at the first trial by petitioner's co-defendants, who had the same motives for impeaching his testimony. Petitioner has not suggested any way in which he would have discredited this witness where the others failed. In short, none of the factors identified in this Court's decisions as bearing on a speedy trial claim favors dismissal here.

Finally, this case is not affected by this Court's recent decision in *Doggett* v. *United States*, No. 90-857 (June 24, 1992). To be sure, both cases involve pre-arrest delays caused by the government's inability to locate the defendants after they left the country. This case, however, differs significantly from *Doggett*, because the district court in this case found that the government did everything it could have done to locate petitioner, and because petitioner acknowledged that he knew the government had contacted his family soon after the indictment was issued. As the Court stated in *Doggett*, "if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." Slip op. 9. Under this standard, petitioner's claim must fail as well.

2. Petitioner also contends (Pet. 21-29) that the admission of Inspector Cunningham's prior testimony after petitioner conceded that the testimony was trustworthy violated his rights under the Confrontation Clause. That Clause guarantees that "[i]n all criminal

prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), this Court reaffirmed the rule that an out-of-court statement made by an unavailable declarant may be admitted into evidence without infringing the defendant's confrontation rights if the statement possesses sufficient indicia of reliability to justify dispensing with cross-examination of the declarant. *Id.* at 3147; see *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Reliability concerns are satisfied, without more, if the statement fits within a firmly rooted hearsay exception. *Wright*, 110 S. Ct. at 3147; *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987). If the statement does not fit within such an exception, it may be admitted if it has "particularized guarantees of trustworthiness." *Wright*, 110 S. Ct. at 3149. Because petitioner did not dispute the trustworthiness of Inspector Cunningham's prior testimony in the district court, he cannot now argue that its admission offended the Constitution.

Nor does petitioner fare better in arguing (Pet. 23-26) that the testimony was improperly admitted under Federal Rule of Evidence 804(b)(5). That Rule allows the introduction of the prior statement of an unavailable witness only if the statement is, *inter alia*, "offered as evidence of a material fact [and is] * * * more probative on [this] point * * * than any other evidence that can [be] procure[d] through reasonable efforts." Petitioner argues (Pet. 25) that the inspector's testimony regarding his 1981 arrest in the Bahamas was not material to the drug trafficking charges. Petitioner, however, did not object to that portion of the prior testimony in the district court (see Gov't C.A. Br. 36), and therefore he cannot properly raise that claim in this Court. In any event, the testimony was material, because it tended to show that petitioner had flown a shipment of quaaludes into the Bahamas. To be sure, the indictment

charged importation into the United States, not the Bahamas, but it alleged more specifically that the shipments into the United States were brought through the Bahamas. See, *e.g.*, Count 2, ¶ 3 ("It was further a part of the conspiracy that * * * BASSEM BOURHAN * * * would fly shipments of methaqualone intended for importation into the United States from Colombia, South America, to the Bahamas."). Similarly, Cunningham's testimony regarding the lack of a market in the Bahamas for the quaaludes was material because it tended to show that the drugs were destined for the United States.

Petitioner also complains (Pet. 26) that the government could have obtained the same evidence from a "vast array" of other Bahamian officials. But petitioner did not object on that ground in the district court (see Gov't C.A. Br. 38-39), and therefore he cannot press that argument here. In any event, Cunningham's position as the leader of a law enforcement task force for a chain of several Bahamian islands during the relevant time period, and his experience in this case, made him especially qualified to offer credible testimony regarding the existence of a market for methaqualone in the Bahamas. Moreover, the record reflects that the government attempted with no success to secure other Bahamian witnesses to testify at petitioner's trial in place of Cunningham. See Gov't C.A. Br. 41-42. Accordingly, the district court properly exercised its discretion in allowing the government to introduce Cunningham's prior testimony at petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992